IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| DAVE O. KALLIO,<br><br>Plaintiff,<br><br>v.<br><br>COLUMBIA COUNTY DEPARTMENT OF ROADS, a local government,<br><br>Defendant. | No. CV-07-1211-HU<br><br>OPINION & ORDER |

Matthew C. Lackey
MATTHEW C. LACKEY, ATTORNEY AT LAW, P.C.
1020 S.W. Taylor Street, Suite 888
Portland, Oregon 97205

Attorney for Plaintiff

Karen O'Kasey
Sean M. Bannon
HOFFMAN, HART & WAGNER, LLP
Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205

Attorneys for Defendant

HUBEL, Magistrate Judge:

Plaintiff Dave Kallio brings this employment-related action against his former employer, defendant Columbia County Department of Roads. Defendant moves for summary judgment against plaintiff's

common-law wrongful discharge claim, and against the constructive discharge portion of plaintiff's statutory disability discrimination claims. Defendant also moves to strike two exhibits submitted by plaintiff in opposition to defendant's summary judgment motion.

Both parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). For the reasons explained below, I grant the summary judgment motion. I deny the motion to strike as moot.

BACKGROUND

Plaintiff was employed by defendant as a road maintenance worker, beginning in August or September 1997. Before applying for the position, plaintiff had the opportunity to review the job description. At the time plaintiff took the job, he believed he could perform all of the essential duties and responsibilities of the position. He did not believe he needed any type of accommodation to perform his job duties.

In his declaration, plaintiff states that he provided defendant with a letter from the Veteran's Administration (VA), stating that he was forty-percent disabled for a service-related disability. Pltf's Declr. at ¶ 4. He further states that this was reviewed with him during the interview process. Id. He cites to Exhibit 1 to his Declaration which is an April 23, 1997 letter from the VA to plaintiff informing him that he had a service-connected disability rating of forty-percent. Exh. 1 to Pltf's Declr. The April 23, 1997 letter from the VA contains no information about the type of disability or any limitations plaintiff may have as a

result of the disability. Id. In deposition, plaintiff stated that he did not mention that he had Gulf War Syndrome, but mentioned only that he had the VA rating. Pltf's Depo. at p. 79.

At the time plaintiff was hired, he worked four ten-hour shifts. He knew when he was hired that the job required four ten-hour shifts in the summer and early fall. Plaintiff's job duties involved patching roads, road grading, sanding, plowing snow, and cutting brush. Although plaintiff admitted in deposition that he had no trouble performing these duties, he states in his declaration that as a result of suffering from Gulf War Syndrome, he became very fatigued after working more than eight hours. Pltf's Declr. at ¶ 5. He also submits two letters written by a co-worker to the VA, in 2005, relating concerns about his health and at least in the first of the two letters, particularly mentioning his fatigue and the four ten-hour shifts he works in the summer months. Exh. 3 to Pltf's Declr.[1]

Plaintiff's supervisor for the first nine months was Donny Titus. Plaintiff states in his deposition that he mentioned several times to Titus that he could not tolerate the four ten-hour shifts. Pltf's Depo. at p. 48. Plaintiff's supervisor changed to Mike Johnstun after about nine months, when plaintiff transferred to the Clatskanie shop from the Vernonia shop. Id. at p. 60. Plaintiff also complained to Johnstun that he had problems with the four ten-hour shifts. Id. at p. 68.

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[1] Defendant separately moves to strikes these two exhibits because they are hearsay. I deny the motion as moot because even without striking the exhibits, I grant defendant's summary judgment motion.

Plaintiff told Johnstun that the long hours were getting hard and he wished they could go back to the five eight-hour shifts permanently. Id. While plaintiff told Johnstun he had Gulf War Syndrome and the long hours made it hard to maintain the job, plaintiff admits that he never made a direct request to Johnstun for accommodation. Id. at pp. 68-69.

Ryan Allen was plaintiff's work crew leader, presumably sometime after Johnstun, although the record is a bit unclear in that regard. Plaintiff raised the schedule change issue with Allen. Allen suggested that plaintiff write a letter to Dave Hill, the County's Director of Public Works and Parks. Allen Depo. at p. 21.

On December 8, 2003, plaintiff wrote a letter to "Dave," requesting that the County stay with a five, eight-hour shift schedule the following year. Exh. 2 to Pltf's Declr. In the letter, plaintiff explained that he has Gulf War Syndrome and that while there are a variety of symptoms, the worst is fatigue. Id. He stated that he gets very tired in the afternoons and feels that his production may start to fall off as well. Id. He then offered how it would be beneficial to the County to have plaintiff work a non-overtime day and noted that allowing him to stay on a five, eight-hour day schedule would provide the County with someone at work on Fridays in case of a call from the office or "C-COM," the County's 911 agency. Id.

Plaintiff states that Hill ignored this request. Pltf's Declr. at ¶ 6. In his deposition, plaintiff acknowledged that he did not recall following up with Hill and asking Hill about the letter or if Hill had had a chance to consider plaintiff's request.

Pltf's Depo. at p 84. Hill states that he did not consider the letter a request for accommodation for a disability, but rather thought plaintiff desired to reduce fatigue for himself and to save the County money. Hill Depo. at pp. 23-24, 27, 41, 42. Hill states that he discussed the request with Allen and asked Allen to let plaintiff know that the request would not work. Id. at p. 28.

Plaintiff also states in his declaration that from December 2003 onward, he made requests for accommodation to Allen and Human Resources Director Jean Ripa. Id. at ¶ 8. He contends that his requests were left unanswered. Id.

Allen states that plaintiff raised the scheduling issue with him several times in 2004 and 2005. Allen Depo. at pp. 28-29. Allen referred plaintiff to Hill. Id. at pp. 27-28. Hill states he heard nothing more from plaintiff about his scheduling request, until after plaintiff left employment with the County. Hill Depo. at p. 28; see also Pltf's Depo. at pp. 83-84 (no recollection of returning to Hill about request).

In his deposition, plaintiff admits that he went to see Ripa, but it was "after a lot of time had passed" from when he gave Hill the letter. Pltf's Depo. at p. 84. Later, he indicates that the meeting with Ripa was in May 2005. Id. at p. 104.

In his deposition, plaintiff states that throughout 2003 and 2004, he worked four ten-hour shifts, but he was always allowed to go home or call in sick if he was fatigued. Pltf's Depo. at pp. 92-93. In his declaration, he states that during the summer of 2004 and 2005, he worked "four, eight hour days" without accommodation which caused a great amount of fatigue and a

worsening of his condition. Pltf's Declr. at ¶ 7.[2]

Plaintiff met with Ripa in approximately May 2005 and discussed his accommodation request to work five eights instead of four tens. Pltf's Depo. at p. 104-05. Ripa's notes from that meeting reveal that plaintiff brought up many issues at the time, only one of which was the schedule request. Exh. 4 to Lackey Sur-Reply. In his deposition, plaintiff stated that he wanted to ask Ripa if she had heard anything about his accommodation request (made in the December 2003 letter to Hill). Id. at p. 105. In his declaration, he states that Ripa told him that the ADA issue would be looked at carefully, but he never heard from her again. Pltf's Declr. at ¶ 9; see also Exh. 4 to Lackey Sur-Reply Declr. (Ripa's notes from meeting indicating that she told plaintiff ADA issue would be looked at).

In his deposition, plaintiff states that Ripa suggested that she, Hill, and the union president meet to try to work something out. Pltf's Depo. at p. 105. Ripa's notes indicate that the meeting was to address several of plaintiff's work complaints, particularly his feeling that Hill disliked him, showed favoritism to other workers, and the lack of advancement opportunities. Exh. 4 to Lackey Sur-Reply Declr.

In her deposition, Ripa testified that when she met with plaintiff in May 2005, he mentioned that he had sent a letter to Hill requesting a schedule accommodation. Ripa Depo. at p. 23. She does not recall what plaintiff said about needing the schedule

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[2] Plaintiff's counsel confirmed at oral argument that the reference to four, eight-hour days should have been to four, ten-hour days.

accommodation. Id. She understood that he had made a similar request a couple of years ago. Id. She states that she told plaintiff that if he was renewing the request, he needed to provide some medical clarification or information to document his diagnosis and need for accommodation of some type. Id. at pp. 23-24. She later testified that she left the ball in plaintiff's court and since he never followed up with providing information, she did not follow up any further. Id. at p. 32. Plaintiff testified that he did not recall Ripa asking for medical documents, but that "[s]he may have." Pltf's Depo. at p. 123.[3] He also testified that at some point during his employment, his physician offered to write a letter to "get [plaintiff] off those long hours[,]" but plaintiff declined to have the physician write the letter. Id. at p. 124.

Ripa also states that she participated in a meeting with plaintiff and his union representative in June 2005, but that neither plaintiff, nor the union representative, raised the issue of ADA accommodation at the meeting. Id. at pp. 24-25.

On December 8, 2005, plaintiff resigned from his employment with the County. He accepted a position as a landscaper with the Clatskanie School District.

In his deposition, plaintiff explained that he applied for the landscaper job with the school district because he "felt that there

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[3] I reject plaintiff's contention that plaintiff's deposition testimony regarding his inability to recall whether Ripa had asked for medical documentation of his disability and his need for accommodation creates a material issue of fact as to whether Ripa did indeed ask for such documentation. Ripa's testimony is unequivocal. Plaintiff's testimony does not contradict Ripa's testimony and does not create an issue of fact.

wasn't much chance of getting to stay on five eights in the summer." Pltf's Depo. at p. 150. He stated that his disability was getting worse, he was getting "tireder" in the afternoons, and after "repeated attempts to reconcile the situation," he started looking for a job with fewer hours. Id.

Plaintiff talked to Hill about his resignation. Hill told plaintiff it would be acceptable for plaintiff to leave early without giving two weeks advance notice. Plaintiff then went to work for Clatskanie School District for nine months. He left after he received a 100% disability award from the VA which plaintiff believed precluded him from working.

At the time plaintiff resigned from the County, in December 2005, the work schedule was five, eight-hour shifts. Little overtime was required. Plaintiff was concerned, however, that the county would go back to four, ten-hour shifts and overtime in the summer.

When plaintiff gave his letter of resignation to Hill, he said nothing to indicate that he was resigning because plaintiff's request for accommodation was not granted. But, plaintiff "figured [Hill] knew that well enough." Pltf's Depo. at p. 200.

No one at the County ever asked plaintiff to resign and no one ever told plaintiff that his job was on the line. One county employee, Kelley Lundburg, once told plaintiff he should find another line of work. Id. at p. 202. The context of the comment was that plaintiff had expressed unhappiness to Lundburg about having been "written up," and Lundburg stated, during a coffee break, while they were "chewing the fat in general," that maybe plaintiff should find another line of work. Id. at p. 203. During

the deposition, plaintiff stated that Lundburg seemed to be joking and laughing when he made the comment. Id. Also at deposition, plaintiff stated that other than that comment, he had no evidence that anybody at the County wanted him to be gone. Id.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith

Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

In his Complaint, plaintiff brings three claims for relief. In the first, he contends that defendant violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA") by (1) failing to engage in an interactive process for identifying and implementing his request for a reasonable accommodation; (2) failing to reasonably accommodate his disability, including, but not limited to, failing to grant his request for a modified work schedule; and (3) taking adverse employment actions against him, including, but not limited to, constructively discharging him from his employment because of his disability. Compl. at ¶¶ 21-23.

In his second claim, he contends that defendant violated Oregon Revised Statutes § (O.R.S.) 659A.100 - 659A.145, Oregon's Disability Discrimination Law, in the same manner as the ADA claim. Id. at ¶¶ 24-26.

In his third claim, he contends that defendant wrongfully, constructively discharged him by "intentionally denying his request for a modified work schedule because Defendant knew that Plaintiff

would quit, or was substantially certain that Plaintiff would quit, because Plaintiff had a disability that made working ten or more hours per day an intolerable working situation." Compl. at ¶ 28.

In this motion for partial summary judgment, defendant moves for summary judgment on the third claim (common law wrongful, constructive discharge), and against those portions of the first and second claims for relief alleging constructive discharge as the adverse employment action.

At oral argument on the motion, plaintiff's counsel expressly stated that plaintiff was not asserting a constructive discharge component to his adverse employment action statutory claims. Relying on that statement, I could simply grant defendant's motion as to that part of each of the statutory claims.

Nonetheless, because the Complaint indicates that plaintiff does indeed base his statutory claims in part on an adverse employment action theory consisting of an alleged constructive discharge, and there has been no motion to amend or dismiss those claims, and because the briefing on the summary judgment motion from both parties comprehensively discusses an alleged constructive discharge claim as part of the statutory claims, I address them here.

I. Preclusion of Common Law Wrongful Discharge Claim

Defendant moves for summary judgment on the wrongful discharge claim because the statutory claims provide an adequate remedy, precluding the ability to bring a common law wrongful discharge claim. As Judge Stewart explained in a 1998 Opinion, wrongful discharge is designed to "serve as a narrow exception to the at-will employment doctrine in certain limited circumstances where the

courts have determined that the reasons for the discharge are so contrary to public policy that a remedy is necessary in order to deter such conduct." Draper v. Astoria Sch. Dist. No. IC, 995 F. Supp. 1122, 1127 (D. Or. 1998), abrogated in part on other grounds, Rabkin v. Oregon Health Sci. Univ., 350 F.3d 967 (9th Cir. 2003). The tort "never was intended to be a tort of general application but rather an interstitial tort to provide a remedy when the conduct in question was unacceptable and no other remedy was available." Id. at 1128.

Thus, generally, under Oregon law, a common law wrongful discharge claim will be precluded by a statutory claim providing an adequate remedy. E.g., Walsh v. Consolidated Freightways, Inc., 278 Or. 347, 351-52, 563 P.2d 1205, 1208-09 (1977) (presence of adequate federal statute redressing termination for reporting unsafe working conditions precluded wrongful discharge claim); Anderson v. Evergreen Int'l Airlines, Inc., 131 Or. App. 726, 734, 886 P.2d 1068, 1072 (1994) ("availability of an adequate statutory remedy precludes an otherwise sufficient common law wrongful discharge claim.").

Plaintiff does not appear to contest that the remedies provided under Oregon's statutory disability discrimination laws include economic, noneconomic, and punitive damages, as well as attorney's fees. O.R.S. 659A.885 (providing for injunctive relief, other appropriate equitable relief, back pay, costs and attorney's fees, compensatory damages, punitive damages, and a jury trial in actions alleging a violation of O.R.S. 659A.100 to 659A.145).

Other judges in this Court have concluded that the remedies provided under the state statute are adequate and thus preclude a

common law wrongful discharge claim based on the same conduct. E.g., Bellingham v. Harry & David Ops. Corp., No. CV-07-3033-PA, 2008 WL 339411, at *5 (D. Or. Feb. 5, 2008) (Judge Panner granting summary judgment to defendant on plaintiff's wrongful discharge claim because Oregon disability statutes provided an adequate statutory remedy); Bailey v. Reynolds Metals Co., No. CV-99-1418-HA, 2000 WL 33201900, at *2 (D. Or. Sept. 11, 2000) (Judge Haggerty concluding that Oregon's disability statues preempted a claim for wrongful discharge because the remedies provided by the legislature are adequate); Robinson v. U.S. Bancorp, No. CV-99-2723-ST, 2000 WL 435468 (D. Or. Apr. 20, 2000) (Judge Stewart concluding that the availability of an action under former O.R.S. 659.436 (now 659A.112) preempts a wrongful discharge claim); Underhill v. Willamina Lumber Co., No. CV-98-630-AS, 1999 WL 421596 (D. Or. May 20, 1999) (Judge Ashmanskas concluding that former O.R.S. 659.425 (a statute providing a cause of action for discrimination on the basis of disability by employment agencies) preempts a wrongful discharge claim).

I reach the same conclusion here. Moreover, whether or not plaintiff actually brings a statutory claim based on the adverse employment action of a constructive discharge, is irrelevant. It is the availability of the adequate statutory remedy in the law that precludes the common law wrongful discharge claim based on the same conduct, not whether plaintiff actually brings a claim under the statute. See Walsh, 278 Or. at 351-52, 563 P.2d at 1208-09 (although plaintiff did not bring a claim under relevant statute, his common-law wrongful discharge claim was nonetheless precluded because the existing statutory law provided a remedy for an

employee who is discharged for complaining of a safety violation).

I grant summary judgment to defendant on the common-law wrongful discharge claim.

II. Constructive Discharge Component of Statutory Claims

As noted above, if plaintiff does not assert a constructive discharge as a basis for the adverse employment action prong of his statutory claims, defendant's motion as to that prong of the statutory claims is granted without further need for discussion.

To the extent plaintiff does assert such a claim, however, I conclude that no reasonable juror would find a constructive discharge based on the facts in the record, and thus, I grant defendant's motion.

A. Legal Standards

Under Oregon law, a discharge is "constructive" if a resignation is forced by unacceptable working conditions. Bratcher v. Sky Chefs, Inc., 308 Or. 501, 503-04, 783 P.2d 4, 5 (1989). More specifically, to prove constructive discharge, a plaintiff must show that (1) the employer intentionally created working conditions that (2) were so intolerable that a reasonable person would have resigned; and (3) the employer created these conditions because it wanted the employee to resign; and (4) the employee left because of those conditions. McGanty v. Staudenraus, 321 Or. 532, 557, 901 P.2d 841, 856-57 (1995). The test is an objective one, not a subjective one. Id.

In order to prove constructive discharge under federal law, plaintiff must show that the working conditions were so intolerable that a reasonable person in the employee's position would have felt

compelled to resign. Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007). The constructive discharge occurs when the working conditions deteriorate as a result of discrimination to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. Id.

B. Discussion

Defendant notes that at the time plaintiff voluntarily resigned, he was working five, eight-hour shifts which caused him no difficulty. Plaintiff acknowledged that if he needed to leave early or was tired while working a four, ten-hour shift week, he was allowed to do so. He admitted that he was never threatened with termination or told he was going to be fired. He failed to follow-up directly with Hill after giving Hill the letter in 2003 and after Allen told him to talk with Hill, and he waited until spring of 2005 to meet with Ripa, about a host of issues, not just the schedule. Even after meeting with Ripa, he failed to provide her with the requested medical documentation and worked another season of the four, ten-hour shift schedule, before resigning.

Plaintiff contends that it is not the four, ten-hour shifts that were intolerable, but defendant's failure to engage in the interactive process and the failure to accommodate his disability that created the intolerable conditions. He argues that a reasonable jury could conclude that defendant repeatedly ignored plaintiff's accommodation requests and could conclude that this was intentional, evidencing defendant's intent to force plaintiff to resign. He suggests that the failure to engage in the interactive

process and the failure to accommodate, with the resulting worsening of his condition, amount to intolerable working conditions for a person with his disability.

Plaintiff's argument is inconsistent with a statutory scheme that recognizes distinct theories of violation. That is, plaintiff would have every failure to accommodate or failure to engage in the interactive process, without more, support a claim for adverse employment action as long as the employee resigned without receiving an accommodation. I see no support for this in either statute.

I do not mean to suggest that a failure to engage in the interactive process or the failure to accommodate can never be relevant to a disability discrimination claim based on a theory of adverse employment action. But, it simply goes too far to conclude that a failure to accommodate or failure to engage in the interactive process is, by definition, and without more, an intolerable working condition capable of supporting a constructive discharge claim.

The facts of each case must be considered. And, while the merits of the failure to engage and failure to accommodate claims are not at issue in the motion, it is relevant to note, in assessing whether the working conditions were so intolerable as to support a constructive discharge, that the interactive process "requires participation by both parties[,]" Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (citing 29 C.F.R. Part 1630, App.), and that a reasonable accommodation is not required when the employee fails to provide requested documentation of his or her medical condition. See Kratzer v. Rockwell Collins,

Inc., 398 F.3d 1040, 1045 (8th Cir. 2005) (affirming summary judgment to employer on accommodation claim when the plaintiff failed to provide requested updated physical evaluation); Allen v. Pacific Bell, 348 F.3d 1113, 1115 (9th Cir. 2003) (absent additional medical evidence from plaintiff regarding a change in limitations, employer was under no duty to further engage in the interactive process); Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (employee's failure to provide medical information precluded her from claiming that the employer failed to provide reasonable accommodation); see also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (noting that while failure by the employer to participate in an informal dialogue after receiving accommodation request could result in liability for failure to provide a reasonable accommodation, if an individual's disability or need for reasonable accommodation is not obvious, the individual's failure or refusal to provide requested reasonable documentation regarding the disability and functional limitations renders the individual ineligible to receive reasonable accommodation) (available at www.eeoc.gov/policy/docs/accommodation.html).

Furthermore, the facts on this record, even when coupled with success on the failure to engage in the interactive process and failure to accommodate claims, cannot support a conclusion that defendant's actions in this case amount to intolerable working conditions.

## CONCLUSION

Defendant's motion for summary judgment (#18) is granted, resulting in the dismissal of plaintiff's common-law wrongful

discharge claim and the portion of the plaintiff's statutory claims asserting an adverse employment action based on constructive discharge. Defendant's motion to strike (#33) is denied as moot.

IT IS SO ORDERED.

Dated this 13th day of January, 2009.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge